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No. 95-1524

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

Jeremiah W. (Jay) Nixon, Attorney General of Missouri, and John Maupin, Chairman, Missouri Ethics Commission, *Petitioners*,

v.

Shrink Missouri Government PAC, a political action committee, W. Bevis Schock and Fredrick T. Dyer, *Respondents*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

JEREMIAH W. NIXON
Attorney General

JAMES R. LAYTON*
Chief Deputy Atty. General

CYNTHIA A. BARRETT
AMY E. RANDLES
STEPHEN R. MARTIN II
Assistant Attorneys General

P.O. Box 899
Jefferson City, MO 65102
(314) 751-3321
Counsel for Petitioners

* *Counsel of Record*

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TABLE OF AUTHORITIES

Cases:

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REPLY TO RESPONDENTS' REASONS FOR DENYING THE WRIT

The respondents' opposition to the petition for writ of certiorari has two principal flaws. First, by focusing this Court's attention on the immediate impacts of the court of appeals ruling, the respondents attempt to persuade this Court that the breadth of the court of appeals holdings can be ignored. But it cannot. The holdings of the Eighth Circuit do not just invalidate a particular law, they eliminate entire avenues of campaign finance reform. Second, by omitting any reference to the related cases now before this Court, the respondents implicitly suggest that the decision of the court of appeals in this case can necessarily be affirmed even if this Court revisits its holdings in *Buckley v. Valeo*.[1] But again, it cannot. The issues raised by the holdings of the court of appeals in this case are based in large part on aspects of *Buckley* that are fundamental to the questions raised by the parties in *Colorado Republican Federal Campaign Committee v. Federal Election Commission*[2] and *Nixon v. Carver*.[3]

1. How crabbed a reading the respondents give to the court of appeals' decision is most clearly shown by their disingenuous reference to the limit on carrying over campaign funds that was enacted as part of Senate Bill 650, codified at Rev. Stat. Mo. 130.038. The respondents claim that those "limits on the expenditure of carryover funds . . . remain in effect."[4] That may be true in theory, for the respondents did not actually challenge the higher carryover

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[1] 424 U.S. 1 (1976).

[2] No. 95-489, *cert. granted*, 116 S.Ct. 689 (1996).

[3] No. 95-1258, *cert. pending*.

[4] Respondents' Brief in Opposition ("Opp.") at 11.

limits contained in the alternative provision. And if the court of appeals had dealt with the carryover provisions as it did with the contribution limits at issue in *Nixon v. Carver*, there might be some logical basis to the respondents' assertion as well. But there is no basis for that claim here.

In *Carver*, the court of appeals relied on the amount of the contribution limit in its analysis of the limit's constitutionality. But the court of appeals did not even mention the amount of the carryover limit in its decision. Instead it affirmed the district court's holding that a carryover restriction -- *any* carryover restriction -- "imposes a substantial burden on political speech by requiring that funds raised during a particular campaign be spent during the campaign." A-13. There is no room in the Eighth Circuit for any carryover restriction, much less for the Senate Bill 650 limit that the respondents claim is still in effect. In fact, the Eighth Circuit's holding effectively enshrines a candidate's asserted right to use contributions for any political purpose -- regardless of the wishes of those who made the contributions. It expressly creates a right to *decline* to use those contributions to speak.

The respondents' characterization of the Eighth Circuit's decision as to Missouri's voluntary expenditure ceilings implicitly emphasizes the essence of that holding: that states cannot differentiate, even as to clearly constitutional requirements such as mandatory disclosure, between those who will and those who will not abide by reasonable ceilings. The Eighth Circuit and the respondents maintain that ceilings can exist only where public funds are available for campaigns. That dramatic expansion of *Buckley* requires additional judicial analysis and, if it is to be accepted, both clarification and endorsement by this Court. Without that clarity and authority, Missouri and

other states in the Eighth Circuit will be precluded, and all other states and Congress will be discouraged from using any such innovative tool to attack the ills of campaign finance in the 1990's and beyond.

2. Even the respondents recognize that in *Buckley* this Court erected an analytical fence between restrictions on contributions and restrictions on expenditures, including independent expenditures. The parties disagree as to the height of the fence -- one of the issues squarely presented to this Court in *Carver*. But the critical difference in this case, as in *Colorado Republican*, is not the height of the fence. Rather, it is the location of the fence line -- the line that defines, when considered along with the level of scrutiny, whether a particular campaign finance reform is permissible or impermissible. Throughout their opposition brief, the respondents assume that the line followed by the fence is readily apparent, making it easy to decide whether particular laws fall on one side or the other. *Colorado Republican* disproves that assumption.[5] In deciding that case, this Court will necessarily blow away at least some of the fog that now obscures part of the fence. The respondents do not and cannot explain how that clarity can help but affect this case, in which the court of appeals was required to peer through the fog to see where the fence goes as it crosses the field where states are trying to prevent candidates from using money *not* to speak. They ignore the hope for clarity as to whether the fence prevents the states, merely by increasing disclosure requirements or by precluding corporate and comparable contributions, from encouraging rational limits on spiraling campaign costs.

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[5] *See Federal Election Commission v. Colorado Republican Federal Campaign Committee*, 59 F.3d at 1015, 1024 (10th Cir. 1995).

This Court should consider this case in order to extend the view that voters and legislators anticipate will come from a decision in *Colorado Republican*.

In addition to seeking clarity as to the line between contributions and expenditures, both *Colorado Republican* and *Nixon v. Carver* raise another fundamental issue. Both ask, *Colorado Republic* implicitly and *Carver* explicitly, what kind of evidence is required to defeat an attack on a state's campaign reform efforts, and the propriety of relying on the studied opinion of the true experts in the field: voters and politicians. For example, the Tenth Circuit in *Colorado Republican* referred to the members of Congress who enacted the law as "surviving veterans of the election campaign process," persons who "should be considered uniquely qualified to evaluate" the ills being addressed in campaign finance reform.[6] The court then largely deferred to the decisions of those experts. On the other hand, the Eighth Circuit in this case ignored the expert views of those who had themselves run for office -- just as in *Carver* it ignored the views of the very voters whose perception of corruption justifies the imposition of contribution limits. The respondents do not recognize the inconsistency of the Eighth and Tenth Circuit's approaches, nor do they see the impact on this case of any declaration by this Court in response to those approaches.

The Eighth Circuit's decision to demand some unspecified kind of additional evidence should not be summarily accepted. Rather, the hundreds of legislators and hundreds of thousands of voters now considering additional attacks on campaign finance problems should be given the guidance they require as to the law that will apply

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[6] *Colorado Republican*, 59 F.3d at 1015.

to their reforms, the standards that will apply in deciding suits to challenge those reforms, and the kind of legislative record that they must compile to successfully defend against those challenges.

CONCLUSION

For the reasons stated in the Petition and further explained above, this Court should grant the petition for writ of certiorari.

Respectfully submitted,

JEREMIAH W. NIXON
Attorney General

JAMES R. LAYTON*
Chief Deputy Atty. General

CYNTHIA A. BARRETT
AMY E. RANDLES
STEPHEN R. MARTIN II
Assistant Attorneys General

P.O. Box 899
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* *Counsel of Record*

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